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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

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GLEN K. SIMPSON, )  
Plaintiff, ) No. CV-07-086-CI  
v. ) ORDER GRANTING PLAINTIFF'S  
MICHAEL J. ASTRUE, ) MOTION FOR SUMMARY JUDGMENT  
Commissioner of Social ) AND REMANDING FOR ADDITIONAL  
Security, ) PROCEEDINGS  
Defendant. )  
)  
)  
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14 BEFORE THE COURT are cross-Motions for Summary Judgment (Ct.  
15 Rec. 14, 17.) Attorney Maureen Rosette represents Plaintiff;  
16 Special Assistant United States Attorney Leisa A. Wolfe represents  
17 Defendant. The parties have consented to proceed before a  
18 magistrate judge. (Ct. Rec. 8.) After reviewing the administrative  
19 record and briefs filed by the parties, the court **GRANTS** Plaintiff's  
20 Motion for Summary Judgment, and remands the matter to the  
21 Commissioner for additional proceedings pursuant to 42 U.S.C. §  
22 405(g).

23

**JURISDICTION**

24 On March 5, 2004, plaintiff Glen K. Simpson (Plaintiff)  
25 protectively filed his applications for disability insurance  
26 benefits. (Tr. 53, 66.) Plaintiff alleged disability due to a back  
27 injury and pain with an onset date of April 12, 2003. (Tr. 66, 70.)  
28 Benefits were denied initially and on reconsideration. (Tr. 39,

1 43.) Plaintiff requested a hearing before an administrative law  
2 judge (ALJ), which was held before ALJ Richard Say on July 28, 2006.  
3 (Tr. 298-323.) Plaintiff, who was present and represented by  
4 counsel, and vocational expert Fred Cutler testified. The ALJ  
5 denied benefits and the Appeals Council denied review. (Tr. 4-7.)  
6 The instant matter is before this court pursuant to 42 U.S.C. §  
7 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript  
10 of proceedings, and are briefly summarized here. At the time of the  
11 hearing, Plaintiff was 48 years old and had a high-school education.  
12 (Tr. 301.) He was married and lived with his spouse. (Tr. 302.)  
13 Plaintiff had served in the military and received \$700.00 a month in  
14 disability benefits from the Veterans Administration. (Tr. 307.)  
15 He had past relevant work as a retail store manager, cashier and  
16 stock clerk. (Tr. 314.) He testified he could lift about 10 pounds  
17 on an occasional basis, could bend occasionally, could stand for 10  
18 minutes and sit for about 15 minutes to an hour before he had to  
19 move around, could walk about a mile before the pain became too bad,  
20 and could sit in a car for about an hour before his back started  
21 hurting. (Tr. 304-11.) Plaintiff also testified he walked the dog,  
22 did some household chores and short tasks in the yard, and watched  
23 television during the days. (Tr. 305-06.) He took medication for  
24 sleep, diabetes, blood pressure, high cholesterol and pain. (Tr.  
25 294.)

26 **ADMINISTRATIVE DECISION**

27 At step one, ALJ Hood found Plaintiff had not engaged in  
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1 substantial gainful activity since the alleged onset date. (Tr.  
 2 17.) At steps two and three, he found Plaintiff had the severe  
 3 impairment of degenerative disc disease of the lumbar spine, which  
 4 did not meet or medically equal one of the listed impairments in 20  
 5 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr.  
 6 17, 19.) The ALJ found Plaintiff's statements regarding limitations  
 7 caused by his impairment symptoms were not totally credible. (Tr.  
 8 20.) At step four, he determined Plaintiff had a residual  
 9 functional capacity (RFC) for "light" work with several postural  
 10 limitations. (Tr. 19.) The ALJ concluded Plaintiff could perform  
 11 his past relevant work as a cashier/checker and could adjust to  
 12 other work that exists in significant numbers in the national  
 13 economy. (Tr. 20-21.) The ALJ determined Plaintiff was not under  
 14 a disability as defined in the Social Security Act at any time  
 15 through the date of his decision. (Tr. 22.)

#### 16 STANDARD OF REVIEW

17 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
 18 court set out the standard of review:

19 A district court's order upholding the Commissioner's  
 20 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
 21 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
 22 Commissioner may be reversed only if it is not supported  
 23 by substantial evidence or if it is based on legal error.  
*Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
 24 Substantial evidence is defined as being more than a mere  
 25 scintilla, but less than a preponderance. *Id.* at 1098.  
 26 Put another way, substantial evidence is such relevant  
 27 evidence as a reasonable mind might accept as adequate to  
 28 support a conclusion. *Richardson v. Perales*, 402 U.S.  
 389, 401 (1971). If the evidence is susceptible to more  
 than one rational interpretation, the court may not  
 substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of  
 Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,

1 resolving conflicts in medical testimony, and resolving  
 2 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 3 Cir. 1995). The ALJ's determinations of law are reviewed  
 4 *de novo*, although deference is owed to a reasonable  
 5 construction of the applicable statutes. *McNatt v. Apfel*,  
 6 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 5 **SEQUENTIAL PROCESS**

6 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 7 requirements necessary to establish disability:

8 Under the Social Security Act, individuals who are  
 9 "under a disability" are eligible to receive benefits. 42  
 10 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 11 medically determinable physical or mental impairment"  
 12 which prevents one from engaging "in any substantial  
 13 gainful activity" and is expected to result in death or  
 14 last "for a continuous period of not less than 12 months."  
 15 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
 16 from "anatomical, physiological, or psychological  
 17 abnormalities which are demonstrable by medically  
 18 acceptable clinical and laboratory diagnostic techniques."  
 19 42 U.S.C. § 423(d)(3). The Act also provides that a  
 20 claimant will be eligible for benefits only if his  
 21 impairments "are of such severity that he is not only  
 22 unable to do his previous work but cannot, considering his  
 23 age, education and work experience, engage in any other  
 24 kind of substantial gainful work which exists in the  
 vocational components.

25 In evaluating whether a claimant suffers from a  
 26 disability, an ALJ must apply a five-step sequential  
 27 inquiry addressing both components of the definition,  
 28 until a question is answered affirmatively or negatively  
 in such a way that an ultimate determination can be made.  
 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 claimant bears the burden of proving that [s]he is  
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 1999). This requires the presentation of "complete and  
 detailed objective medical reports of h[is] condition from  
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 404.1512(a)-(b), 404.1513(d)).

25 It is the role of the trier of fact, not this court, to resolve  
 26 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
 27 supports more than one rational interpretation, the court may not  
 28

1 substitute its judgment for that of the Commissioner. *Tackett*, 180  
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
3 Nevertheless, a decision supported by substantial evidence will  
4 still be set aside if the proper legal standards were not applied in  
5 weighing the evidence and making the decision. *Brawner v. Secretary*  
6 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
7 there is substantial evidence to support the administrative  
8 findings, or if there is conflicting evidence that will support a  
9 finding of either disability or non-disability, the finding of the  
10 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
11 1230 (9<sup>th</sup> Cir. 1987).

12   **ISSUES**

13         The question is whether the ALJ's decision is supported by  
14 substantial evidence and free of legal error. Plaintiff argues the  
15 ALJ erred when he (1) found Plaintiff had no severe mental  
16 impairments at step two; (2) rejected psychologist Dennis R.  
17 Pollack's findings that he had several marked limitations; (3)  
18 assessed Plaintiff's RFC; and (4) found Plaintiff not entirely  
19 credible. (Ct. Rec. 15 at 12-18.)

20   **DISCUSSION**

21         **A. Credibility**

22         At the hearing, Plaintiff testified he did some household  
23 chores, and did short tasks in his yard. He drove but seldom went  
24 shopping because it was painful to stand for any length of time.  
25 (Tr. 305-06.) He stated he watched six to seven hours of television  
26 a day, sitting for anywhere between 15 minutes to one hour before he  
27 had to change positions. (Tr. 309.) He stated he could drive, walk  
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1 a mile, could bend on occasion, lift about 10 pounds on an  
2 occasional basis, and sit in a car for about one hour. He testified  
3 he slept poorly due to leg cramps and pain. (Tr. 309-10.)

4 In his decision, the ALJ found:

5 After considering the evidence of record, the undersigned  
6 finds that the claimant's medically determinable  
7 impairments could reasonably be expected to produce the  
alleged symptoms, but that the claimant's statement  
concerning the intensity, persistence and limiting effects  
of these symptoms are not entirely credible.  
8

9 (Tr. 20.) Plaintiff correctly argues the ALJ did not provide  
10 legally sufficient reasons for rejecting his testimony. (Ct. Rec.  
11 15 at 18-10.)

12 In *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002),  
13 the court found when an ALJ finds the claimant's statements as to  
14 the severity of impairments and limitations is unreliable, the ALJ  
15 must make a credibility determination with findings sufficiently  
16 specific to permit the reviewing court to conclude the ALJ did not  
17 arbitrarily discredit claimant's allegations. The ALJ may consider  
18 the following factors when weighing the claimant's credibility: the  
19 claimant's reputation for truthfulness, inconsistencies either in  
20 his allegations of limitations or between his statements and  
conduct, his daily activities and work record, and testimony from  
21 physicians and third parties concerning the nature, severity, and  
22 effect of the alleged symptoms. *Light v. Social Sec. Admin.*, 119  
23 F.3d 789, 792 (9th Cir. 1997). If the ALJ's credibility finding is  
24 supported by substantial evidence in the record, the court may not  
25 engage in second-guessing. See *Morgan*, 169 F.3d at 600. If there is  
26 no affirmative evidence that the claimant is malingering, the ALJ  
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1 must provide "clear and convincing" reasons for rejecting the  
2 claimant's allegations regarding the severity of symptoms. *Reddick*  
3 v. *Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir. 1998).

4 Here, the ALJ gave no cogent reasons for discrediting  
5 Plaintiff's allegations and did not specify what statements were  
6 unreliable. Where the fact-finder has not asserted specific  
7 reasons, the court cannot assume a claimant's lack of credibility.  
8 See *Connett v. Barnhart*, 340 F.3d 871, 874 (2003); *Dodrill v.*  
9 *Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993). Further, where the  
10 Commissioner fails to give "clear and convincing" reasons for  
11 rejecting a claimant's testimony, that testimony is credited as  
12 true. *Benecke v. Barnhart*, 379 F.3d 587, 594 (9<sup>th</sup> Cir. 2004); *Lester*  
13 v. *Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995). If the improperly  
14 rejected testimony is credited, and it is clear from the record that  
15 Plaintiff is disabled, the court will not remand a case solely to  
16 allow the Commissioner to make new credibility findings. *Lester*, 81  
17 F.3d at 834. However, if it is not clear from the record that  
18 Plaintiff is disabled as defined by the Social Security Act, or  
19 where evidence has been identified that may be a basis for a  
20 credibility finding, but the findings are not articulated, remand is  
21 the proper disposition. *Harman*, 211 F.3d at 1178; *Gonzalez v.*  
22 *Sullivan*, 914 F.2d 1197, 1202 (9<sup>th</sup> Cir. 1990).

23 **B. Step Two: Severe Mental Impairment**

24 Plaintiff claims the ALJ improperly rejected the assessment of  
25 Plaintiff's mental functional capacity by Dr. Pollack, and that if  
26 credited, Dr. Pollack's opinions would support a finding of a severe  
27 mental impairment that caused "marked" limitations in Plaintiff's  
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1 ability to perform basic work related functions on a regular basis.  
2 Plaintiff argues this would lead to a determination of "disabled,"  
3 based on the vocational expert's testimony. (Ct. Rec. 15 at 16; Tr.  
4 322.)

5 To satisfy step two's requirement of a severe impairment, the  
6 Plaintiff must establish the existence of a mental impairment by  
7 providing medical evidence consisting of signs, symptoms, and  
8 laboratory findings; Plaintiff's own statement of symptoms alone  
9 will not suffice. 20 C.F.R. § 404.1508. The effects of all  
10 symptoms must be evaluated on the basis of a medically determinable  
11 impairment which can be shown to be the cause of the symptoms. 20  
12 C.F.R. § 404.1529. However, an overly stringent application of the  
13 severity requirement violates the statute by denying benefits to  
14 claimants who do meet the statutory definition of disabled. *Corrao*  
15 v. *Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the  
16 Commissioner has passed regulations which guide dismissal of claims  
17 at step two. Those regulations state an impairment may be found to  
18 be not severe *only* when evidence establishes a "slight abnormality"  
19 on an individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303,  
20 306 (9th Cir. 1988) (*citing Social Security Ruling (SSR) 85-28*).  
21 The step two inquiry is a *de minimis* screening device to dispose of  
22 groundless or frivolous claims. *Bowen v. Yuckert*, 482 U.S. 137,  
23 153-154 (1987).

24 A mental impairment generally is considered non-severe for  
25 purposes of step two if the degree of limitation in the three  
26 functional areas of activities of daily living, social functioning,  
27 and concentration, persistence or pace is rated as "none" or "mild"  
28

1 and there have been no episodes of decompensation. 20 C.F.R. §§  
2 404.1520a(d)(1), 416.920a(d)(1).

3 Dr. Pollack completed a psychological evaluation and Mental  
4 Medical Source Statement (MSS) in July 2006. (Tr. 2284-93.) At the  
5 interview, Plaintiff reported he could not work because of diabetes,  
6 depression and anxiety. (Tr. 285.) In the MSS, Dr. Pollack  
7 assessed no limitations in the majority of mental activities listed.  
8 (Tr. 290-91.) The two areas in which he found "marked" limitations  
9 were: "the ability to perform activities within a schedule, maintain  
10 regular attendance and be punctual within customary tolerances," and  
11 "the ability to complete a normal workday and work week without  
12 interruptions from psychologically based symptoms and to perform at  
13 a consistent pace without an unreasonable number and length of rest  
14 periods." (Id.)

15 Case law requires the uncontroverted opinions of examining  
16 physicians be rejected only with "clear and convincing" evidence.  
17 *Lester*, 81 F.3d at 830. To meet this burden, the ALJ can set out a  
18 detailed and thorough summary of the facts and conflicting clinical  
19 evidence, state his interpretation of the evidence, and make  
20 findings. *Thomas*, 278 F.3d at 957. The ALJ is not required to  
21 accept the opinion of a treating or examining physician if that  
22 opinion is brief, conclusory and inadequately supported by clinical  
23 findings. *Id.* The opinions of an examining physician who examined  
24 plaintiff only once are insufficient to outweigh the opinion of a  
25 treating physician who cared for Plaintiff over a period of time and  
26 who provided an opinion supported by explanation and treatment  
27 records. *Holohan*, 246 F.3d at 1207.

28

1       The ALJ thoroughly discussed the psychological evaluation,  
2 noting that Plaintiff had traveled to Europe in 2005, and that Dr.  
3 Pollack expressed surprise "that the claimant reported 'severe  
4 depression and anxiety as well as having no income and he is able to  
5 travel throughout Europe in 2005.'" (Tr. 18, 289.) The ALJ  
6 assigned no weight to this evaluation because "of various  
7 inconsistencies in the report and accompanying Mental Medical Source  
8 Statement." (Tr. 19.) He reasoned that the primary diagnosis of  
9 polysubstance abuse, in remission, could not be the basis for  
10 "marked" limitations because that abuse occurred "at least 17 years  
11 ago" according to Plaintiff's own report. (*Id.*) The ALJ also  
12 rejected limitations caused by diabetes because the medical  
13 condition was outside the scope of Dr. Pollack's expertise, and the  
14 record indicated Plaintiff was non-compliant with treatment and  
15 improved significantly when treated. (Tr. 19, 210, 263, 268.)  
16 Other reasons given by the ALJ for rejecting the examining  
17 psychologist's report were "no evidence of longitudinal history of  
18 diagnoses or treatment" to establish the durational requirement of  
19 12 months, and no evidence of hospitalization or treatment of  
20 psychological problems. (Tr. 19.) These are "clear and convincing"  
21 reasons, supported by the record, for rejecting Dr. Pollack's  
22 opinions.

23       For example, the record shows that Plaintiff did not list a  
24 mental condition as a reason for being unable to work in his  
25 application. (Tr. 70.) Medical records from July 2003, indicate  
26 Plaintiff had "not had any treatment for depression during the last  
27 year." (Tr. 220.) Progress notes from the Veteran's Administration  
28

1 (VAMC) for June 2004, state Plaintiff reported he took medication  
2 for depression (Tr. 213), but there was no anti-depressant in the  
3 list of medications. (Tr. 210.) In Plaintiff's October 2004,  
4 Function Report, he mentions "trouble with depression," and a  
5 prescription drug (Amitriptyline) for depression. (Tr. 119.)  
6 Records thereafter, however, do not indicate a diagnosis or  
7 treatment for depression or other mental condition. In March and  
8 September 2004, treating physician Alex MacKay, M.D., opined  
9 Plaintiff could not do his prior work, but recommended retraining in  
10 an occupation that involved a sit/stand alternative and limited  
11 repetitive lifting. Dr. MacKay reported Plaintiff also wanted  
12 rehabilitation in this type of work. (Tr. 232, 235.)

13 At the hearing, Plaintiff stated he had had some depression,  
14 but was not being treated. (Tr. 303.) He did not report disabling  
15 psychological symptoms in his testimony. Further, the list of  
16 medications submitted at the time of the hearing did not include  
17 anti-depressants or other treatment for emotional problems. (Tr.  
18 294.) Clinical notes from Dr. MacKay and the VAMC do not indicate  
19 mental health conditions affected Plaintiff's ability to work.

20 Although the step two analysis is a *de minimis* screening to  
21 exclude frivolous claims, the existence of an impairment at step two  
22 cannot be established on the basis of symptoms alone. *Ukolov v.*  
23 *Barnhart*, 420 F.3d 1002 (9<sup>th</sup> Cir. 2005); SSR 96-4p. In *Ukolov*, the  
24 court quoted SSR 96-4: "[R]egardless of how many symptoms an  
25 individual alleges, or how genuine the individual's complaints may  
26 appear to be, the existence of a medically determinable physical or  
27 mental impairment cannot be established in the absence of objective

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1 medical abnormalities." Because the ALJ properly rejected Dr.  
 2 Pollack's diagnoses and functional limitations, and because the  
 3 record does not include objective evidence of a mental disorder that  
 4 significantly limits his ability to perform basic work activities  
 5 and which "has lasted or can be expected to last for a continuous  
 6 period of not less than 12 months," the Plaintiff has not met his  
 7 burden at step two to establish a severe mental impairment. 42  
 8 U.S.C. §§ 423 (d)(1)(A); *Celaya v. Halter*, 332 F.3d 1177, 1180 (9<sup>th</sup>  
 9 Cir. 2003).

10 The evidence viewed in its entirety reasonably supports the  
 11 ALJ's finding of no severe mental impairment. *Tackett*, 180 F.3d at  
 12 1097. The ALJ did not err in his rejection of Dr. Pollack's  
 13 opinions. Consequently the ALJ did not err in omitting mental  
 14 limitations in his RFC findings and hypothetical question to the  
 15 vocational expert.

16 **C. Residual Functional Capacity Findings**

17 At step four, the ALJ determined Plaintiff had a RFC for "light  
 18 exertion level work activities, requiring only occasional bending,  
 19 stooping, crouching, crawling, kneeling, balancing, or climbing of  
 20 ramps and stairs, but no ropes, ladders or scaffolding." (Tr. 19.)  
 21 Crediting the Plaintiff's improperly rejected testimony that he  
 22 could only lift 10 pounds occasionally, stand for 15 minutes, and  
 23 sit 15 minutes to one hour before he had to move around, (Tr. 304-  
 24 05, 308-10), the RFC findings are not supported by substantial  
 25 evidence.<sup>1</sup>

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26  
 27 <sup>1</sup> "Light work" involves lifting no more than 20 pounds at a  
 28 time with frequent lifting or carrying objects weighing up to 10

1       Further, at step five, the ALJ's second hypothetical to the  
 2 vocational expert described an individual who could perform  
 3 repetitive lifting of ten to twenty pounds and standing at 15-minute  
 4 intervals for six hours in an eight-hour day. (Tr. 316.) The  
 5 vocational expert testified that there would be unskilled jobs at  
 6 the "light" level with the flexibility of sitting or standing. (Tr.  
 7 319.) It appears the ALJ relied on this testimony in his step five  
 8 finding. (Tr. 21) Because the second hypothetical did not include  
 9 a lifting limitation of 10 pounds occasionally, the vocational  
 10 expert's testimony that there are jobs Plaintiff could perform has  
 11 no evidentiary value. *Embrey v. Bowen*, 849 F.2d 418, 422-23 (9<sup>th</sup>  
 12 Cir. 1988). The vocational expert did not opine whether there were  
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14 pounds, and a good deal of walking or standing. Light work may also  
 15 involve sitting most of the time, but with "some pushing and pulling  
 16 of arm-hand or leg-foot controls, which require greater exertion  
 17 than in sedentary work." However, relatively few unskilled light  
 18 jobs entail working in a seated position. *SSR 83-10*. "Occasional"  
 19 means very little, up to one third of the time (about two hours of  
 20 an eight hour work day). *Id.*

21       "Sedentary work" involves  
 22 lifting no more than 10 pounds at a time and occasionally  
 23 lifting or carrying articles like docket files and small  
 24 tools. Although sitting is involved, a certain amount of  
 25 walking and standing is often necessary in carrying out the  
 26 job duties. Jobs are sedentary if walking and standing  
 27 are required occasionally and other sedentary criteria are  
 28 met. Work performed primarily in a seated position  
 entails no significant stooping.

27       *Id.* Good use of the hands and fingers for repetitive hand-finger  
 28 actions is required generally in unskilled sedentary jobs. *Id.*

1 sedentary jobs that the Plaintiff could perform.

2 **D. Remedy**

3 As discussed above, even if the Plaintiff's testimony is  
4 credited, it is not clear from the record that Plaintiff is disabled  
5 as defined by the Social Security Act; therefore, remand for  
6 additional proceedings is appropriate. *Harman*, 211 F.3d at 1178.  
7 On remand, the ALJ shall conduct a new sequential evaluation,  
8 including but not limited to reevaluation of Plaintiff's  
9 credibility, residual functional capacity and new vocational expert  
10 testimony. The Plaintiff may submit additional evidence of mental  
11 impairments for the relevant period. Accordingly,

12 **IT IS ORDERED:**

13 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is  
14 **GRANTED**. This matter is remanded to the Commissioner for additional  
15 proceedings pursuant to sentence four of 42. U.S.C. § 405(g) and the  
16 decision above;

17 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is  
18 **DENIED**;

19 3. An application for attorney fees may be filed by separate  
20 motion.

21 The District Court Executive is directed to file this Order and  
22 provide a copy to counsel for Plaintiff and Defendant. Judgment  
23 shall be entered for Plaintiff and the file shall be **CLOSED**.

24 DATED December 17, 2007.

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26 

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S/ CYNTHIA IMBROGNO  
27 UNITED STATES MAGISTRATE JUDGE  
28